In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

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SUPREME COURT, U.S.

No. 279

NORTH CAROLINA,

Petitioner

v.

CRAWFORD,

Respondent

On Petition For A Writ of Certiorari To the United States Court of Appeals For The Fourth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit has not been generally reported as of this date but it is adequately set forth as Appendix E to the Petition.

JURISDICTION

The jurisdiction of this Court is adequately represented in the Petition to arise under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Was the Court of Appeals correct in holding that a state acts to deprive an accused of his life without due process or, alternatively, to deny him equal protection, when in a capital case where the death penalty must be imposed unless the jury recommends life imprisonment, the jury which returned a verdict of guilty and imposed the penalty of death was selected in the following manner:

a) 45.33% of all jurors examined on voir dire (34 of 75) were dismissed for cause (and not upon peremptory challenge) without particular examination to determine whether they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them;

b) In contrast, a venireman who held it his duty to inflict capital punishment should the defendant be found guilty of murder was empaneled and served;

c) In further contrast, a defense challenge for cause to dismiss a juror acknowledging a fixed opinion regarding the guilt of the accused was denied and the juror empaneled after searching examination by the court determined that the juror would be able to decide according to the evidence;

d) All those permitted to serve on the jury consisted solely of persons known to believe in capital punishment, and none entertained even a slight reservation which could be laid aside in the face of the evidence in a given case;

e) Those drawn on voir dire reflected a competent cross-section of the community but those eligible and empaneled after the systematic exclusions and inclusions were grossly unrepresentative.

STATEMENT OF THE CASE

As supplemented by those facts expressly present in this case, set out in the Statement of the Question supra, Petitioner's Statement of the Case is adequate.

REASONS FOR DENYING THE WRIT

No reason whatever exists to issue a Writ of Certiorari in this case because:

1) Tested by this Court's decision in Witherspoon v. Illinois, 88 S.Ct. 1770 (1968), the conclusion of the Court of Appeals that the manner in which the jury was selected deprived respondent of his constitutional rights under the fourteenth amendment was clearly correct;

2) The extent to which the Court of Appeal's dicta may have exceeded the scope of this Court's subsequent holding in Witherspoon creates no "conflict" with this Court's decision and no problem respecting the appropriate methods of jury selection constitutionally available to the State;

3) The specific relief provided by the Court of Appeals in this case differs in no respect whatever from the type of relief which the State Supreme Court has provided in equivalent cases, and does not conflict with Witherspoon;

4) Further consideration of this case can serve no appropriate purpose and would, rather, merely aggravate the delay which operates to the mutual disadvantage of the State and the accused alike.

1. The conclusion of the Court below was clearly correct.

As determined by the Court below, the facts of this case are even more egregious than those in Witherspoon. In this case, as in Witherspoon, the jury which imposed the death penalty pursuant to the state statute making the penalty optional was taken from a panel from which 45.33% of those qualified to serve were systematically eliminated following a challenge for cause based on their wholly unexamined scruples with respect to the death penalty. At the same time, "a venireman who held it his duty to inflict capital punishment should the defendant be found guilty of murder," was empaneled and served (opinion below, Petitioner's Brief, p. 44, Judge Bryan concurring). And "the procedure [used to eliminate 45.33% of the panel on the strength of untested reservations to the death penalty] was in strong contrast to the probing of the juror who reported that he had read of the case in the newspapers and had formed a fixed opinion. He was seated after agreeing that he could eliminate his fixed opinion from his mind and decide the case on the evidence." (opinion below, Petitioner's Brief, p. 30, Judge Haynesworth, concurring.)

The Opinion in Witherspoon indicates this Court's correct understanding of these matters (88 S.Ct. 1770, 1777 n. 20):

> One . . . requirement at least is that the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death. It was in part upon such a premise that the Fourth Circuit recently invalidated a North Carolina murder conviction, noting that a juror who felt it his "duty" to sentence every convicted murderer to death was allowed to serve in that case, "while those who admitted to scruples against capital punishment were dismissed without further interrogation." This "double standard," the court concluded, "inevitably resulted in [a] denial of due process." Crawford v. Bounds, _____F.2d _____, _____ _____. _____ (alternative holding).

In pitiful understatement, moreover, the State concedes in its Petition to this Court that "It is most doubtful that the method used by North Carolina in this case is sufficient to meet the test of Witherspoon." (Petitioner's Brief at p. 6)

2. Opinions expressed by individual judges below create no meaningful conflict with the holding of this Court in Witherspoon which itself provides clear and authoritative guidelines respecting appropriate methods of jury selection constitutionally available to the State.

Precisely to eliminate all uncertainty respecting state challenges for cause in cases where the death penalty may be imposed, this

Court provided the following clear guidelines in Witherspoon (88 S.Ct. at 1777):

> Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.[21]
>
> 21. Just as veniremen cannot be excluded for cause on the ground that they hold such views, so too they cannot be excluded for cause simply because they indicated that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him.
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> . . . .
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> We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

There is consequently no basis whatever for the State's claim that it remains confused on this point. Indeed, were this Court to grant certiorari in this case, it could surely do no more by way of clarification than simply to restate what it has just stated in Witherspoon.

To be sure, three of the seven judges in the court below (Judges Sobeloff, Winter, and Butzner) believed that only an attitude toward the death penalty which would preclude a juror from rendering a fair verdict on the issue of guilt should be sufficient to warrant the juror's dismissal for cause. Lacking the gift of prophecy respecting the ultimate disposition of Witherspoon which the Court of Appeals respectfully noted was then pending in this court, the seven fourth circuit judges in this case understandably differed among themselves as to the precise scope of the appropriate holding. These differences are now entirely beside the point, however, since the State may now rely upon the very specific guidelines

provided by Witherspoon and has no reason whatever to imply that the Court of Appeals would disrespect the law of the land as authoritatively determined by this Court. The State's assertion that North Carolina will be forced to adopt a two-trial system in capital cases unless certiorari is granted in this case ignores the fact that Witherspoon of course applies to the fourth circuit including North Carolina. It also represents a misreading of the lower court opinion in this case as well.

3. Relief provided by the Court of Appeals in this case is the same as that uniformly provided by the North Carolina Supreme Court in equivalent cases, and it does not conflict with this Court's disposition in Witherspoon.

On numerous occasions the Supreme Court of North Carolina has reversed convictions in capital cases on the basis of error related solely to the determination of the penalty alone, and not on the basis that there was any irregularity respecting the determination of guilt. Nonetheless, the State Supreme Court in each such case has ordered that the accused shall have a new trial and not merely that he shall be remanded for resentencing.

In State v. Dockery, 238 N.C. 222, 77 S.E.2d 664 (1953), for instance, the sole error found by the court consisted of argument by the prosecutor urging that the jury return a verdict of guilty of murder in the first degree without recommendation that punishment be life imprisonment, following which the jury did in fact return a verdict of guilty carrying a penalty of death. Holding that any suggestion as to the causes for which the jury could or ought to exercise its unbridled discretion respecting the penalty, the State Supreme Court reversed the entire conviction and ordered a new trial. Similarly, in State v. Pugh, 250 N.C. 278, 108 S.E.2d 649 (1959), where the sole error consisted of the trial court instructing the jury that the state believed the death penalty was appropriate to that case, again a complete retrial was ordered. (Other cases are reviewed in the concurring opinion by Mr. Justice Denny in the Pugh case, at p. 380.)

It is frankly unclear why the North Carolina Court provides an accused with a second trial where the only reversible error affects solely the sentence and does not reflect upon the integrity of the jury's determination of guilt, but it is enough in this case to know that this is the state's own procedure in capital cases. Thus, the order of the court below in this case cannot be said to grant relief in any respect different from the relief granted by the state's own courts in equivalent situations.

It is entirely possible, moreover, that an order by the court below remanding the respondent only for resentencing would be incapable of satisfaction by the state courts. This possibility

exists because there is no provision under North Carolina law which authorizes a judge sitting without a jury to impose a capital sentence in any case and, so far as can be determined, there is no provision under North Carolina law which authorizes the empanelling of a jury solely to return a recommendation respecting a capital sentence, unattached to its own verdict of guilt or innocence. Indeed, the fact that the death sentence is by statute (G.S. 14-17) indissolubly linked with a single jury verdict respecting guilt or innocence may explain why the State Supreme Court itself has ordered new trials, rather than resentencing, in equivalent circumstances.

Finally, however, it is not true that the relief granted in this case is inconsistent with this Court's disposition of Witherspoon. Here, unlike Witherspoon, the jury was not merely culled of those known only to possess unexamined scruples against the death penalty. Rather, as already established supra, the jury was further distorted in that one of its members was allowed to serve even though he had acknowledged he had formed an opinion about the case in advance of trial, and still another acknowledged that he considered imposition of the death penalty a "duty." In short, the extent or degree to which respondent was denied his right to fair cross-sectional representation in the selection of his jury in this case is significantly greater than in Witherspoon; so much greater, in fact, that it cannot be assumed to have left the integrity of the fact-finding process unaffected. Indeed, one of the Court of Appeals judges concurred to make the order of the court below unanimous soley on the basis of these additional, aggravating factors (Petitioner's Brief, p. 44):

> "[I] would reverse the conviction here for disallowance of the defense challenge to a veniremen who held it his duty to inflict capital punishment should the defendant be found guilty of murder. Cf. Stroud v. United States, 251 U.S. 15, 20 (1919); United States v. Puff, supra, 211 F.2d 171, 182. Moreover, there was trial error in the admission of inflammatory evidence and advertence before the jury to the defendant's prior criminal record. These incidents necessitate a new trial, and for that reason I concur in the determination of the court to reverse."

4. Further consideration of this case can serve no useful purpose and would, rather, merely aggravate the delay which has already operated to the mutual disadvantage of the State and the accused alike.

For the reasons developed above, further consideration of this case can serve no useful purpose. Bearing in mind that the accused is charged with a capital offense allegedly committed nearly six years ago, and that further delay can operate only to handicap the State as well as the accused in achieving a fair trial on the original indictment, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Associated on the Brief